

AUTHORIZATION TO EXECUTE AGREEMENT WITH
CHAMPLAIN COLLEGE FOR PLACEMENT OF A GEOTHERMAL CONDUIT
IN MAPLE ST. RIGHT OF WAY

In the year Two Thousand Twelve.....
Resolved by the City Council of the City of Burlington, as follows:

That WHEREAS, Champlain College desires to construct, maintain and use an underground pipe/line/conduit upon, in and across the Maple St. right of way for the benefit of an energy-efficient geothermal water system to serve Champlain's new residential housing known as the Res-Tri Dormitories located on the north side of Maple St.; and

WHEREAS, the Department of Public Works and the Mayor, after consultation with the City Council Transportation, Utilities, and Energy Committee and the Board of Finance, have reviewed the plans for placement of this conduit and have negotiated an agreement to protect the present and future rights and needs of the City in its responsibility to protect the use of the public streets for public travel and convenience and governmental purposes; and

WHEREAS, this agreement calls for a payment of \$2500 for the placement of this conduit, which is approximately twenty (20) feet in width, such sum being in part in recognition of the sustainable and renewable energy aspects of this project; and

WHEREAS, the occupation of the City's right of ways requires approval of the Burlington City Council and excavations of the rights of way requires the approval of the Department of Public Works;

NOW, THEREFORE, BE IT RESOLVED that the Honorable Mayor Miro Weinberger be and hereby is authorized to execute an Agreement with Champlain College pursuant to which Champlain College construct, maintain and use an underground pipe/line/conduit upon, in and across the Maple St. right of way for the benefit of an energy-efficient geothermal water system to serve Champlain's new residential housing known as the Res-Tri Dormitories located on the

north side of Maple St., subject to the approval of the Chief Administrative Officer and the City Attorney, in substantially the same form as the agreement attached hereto.

6/11/12

GEOTHERMAL WATER SYSTEM AGREEMENT WITH CHAMPLAIN COLLEGE

This Agreement is made by and between the City of Burlington, a municipal corporation organized and validly existing under the laws of the State of Vermont (hereinafter "City") and Champlain College Incorporated, a Vermont non-profit educational corporation with its principal offices in Burlington, Vermont (hereinafter "Champlain").

WHEREAS, Champlain seeks to construct, maintain, repair, replace and use an underground pipe/line/conduit ("Conduit") upon and across Maple St. for the benefit of an energy-efficient geothermal water system ("Geothermal System") to serve Champlain's residential housing known as Res-Tri Dormitories located on the north side of Maple St; and

WHEREAS, such activity requires the running of said Conduit upon and across the City's right of way on Maple St., such occupation of the right of way to be approximately twenty (20) feet in width and running from the southerly sideline of the right of way for Maple Street to the northerly sideline of the right of way for Maple St., the centerline of said occupation being located approximately 438 feet west of the westerly sideline of South Willard St. at the Maple St. intersection, as depicted and shown on a Plan entitled "Geothermal Water System Plan and Profile, Champlain College, prepared by Engineering Ventures PC, dated January 10, 2012, last revised on February 3, 2012 ("Plan") and adopted by reference into this Agreement and placed on file in the Department of Public Works; and

WHEREAS, the occupation of the City's right of ways requires approval of the Burlington City Council and the excavation of right of ways requires the approval of the Department of Public Works;

W I T N E S S E T H:

NOW, THEREFORE, in consideration of the above and the following mutual

covenants the City and Champlain enter into the following Agreement:

1. **CONDUIT PLACEMENT, CONSTRUCTION, MAINTENANCE, REPLACEMENT & USE**

Champlain may construct, maintain, repair, replace and use an underground Conduit for the benefit of an energy-efficient Geothermal System to serve Champlain's residential housing known as Res-Tri Dormitories located on the north side of Maple St upon and across the City's right of way on Maple St., subject to the terms and conditions set forth in this Agreement.

Such occupation of the right of way is to be at a depth as depicted and shown on a Plan entitled "Geothermal Water System Plan and Profile, Champlain College, prepared by Engineering Ventures PC, dated January 10, 2012, last revised on February 3, 2012 ("Plan") and adopted by reference into this Agreement and placed on file in the Department of Public Works.

The Conduit is approximately twenty (20) feet in width. The Conduit will run from the southerly sideline of the right of way for Maple Street to the northerly sideline of the right of way for Maple St., the centerline of said Conduit being located approximately 438 feet west of the westerly sideline of South Willard St. at the Maple St. intersection, as depicted and shown on a Plan entitled "Geothermal Water System Plan and Profile, Champlain College, prepared by Engineering Ventures PC, dated January 10, 2012, last revised on February 3, 2012 ("Plan") and adopted by reference into this Agreement.

Any and all construction, maintenance, repair, or replacement shall be subject to and done pursuant to and in compliance with all applicable governmental requirements, approvals and permits required for such work. Any applicable fee required for such work shall be in addition to the fee set forth in § 9 of this Agreement. Furthermore, this agreement does not in any way obligate any department or office of the City to approve any permit required for the work done pursuant to this Agreement. The City shall act in good faith and utilize reasonable engineering standards on making its permitting decisions.

The right to construct, maintain, repair, replace and use an underground Conduit in the above location is offered and accepted "AS IS, WHERE AS" and "WITH ALL FAULTS;" and neither the City nor its agents, employees or other representatives make any guarantee, representation or warranty, express or implied (and the City shall not have any liability whatsoever) as to the value, uses, habitability, condition, design, operation, financial condition or prospects, or fitness for a particular purpose or use of the right of way or the City's land adjacent thereto, or any part thereof, or any other guarantee, representation or warranty whatsoever, express or implied, with respect to

the right of way or any part thereof or the City's land adjacent thereto, or information supplied to Champlain with respect thereto. Further, the City shall have no liability for any latent, hidden, or patent defect as to the right of way or the City's land adjacent thereto.

2. **RELOCATION**

The Parties acknowledge and agree that the use, repair, improvement and maintenance of the Maple St. right of way, including sidewalks, street, and combined sewer/storm water and storm water system have first priority to, within, on, or about the right of way. This Agreement conveys no property interest or vested right in the public streets or rights of way and the Parties acknowledge and agree that the City reserves the right to use the public streets for its own governmental purposes and the rights given by this Agreement cannot interfere with the use, repair, improvement and maintenance of the right of way or the public conveniences in traveling on or using such right of way. This Agreement does not diminish or negate any of Champlain's existing rights as a property owner under common law or statute, or any of the City's existing rights as a municipality under common law or statute.

The Parties acknowledge and agree that the City Engineer or his/her designee may at his or her sole discretion at a future date determine in good faith that it is necessary to relocate utilities, including Champlain's Conduit, within and/or upon the Maple St. right of way for the proper maintenance and improvement of this right of way, including the maintenance and improvement of the street, sidewalks, and storm water and/or combined sewer/storm water system located upon and within the right of way.

In the event of such a determination and upon reasonable written notice of no less than six (6) calendar months, Champlain shall relocate at its sole expense said Conduit pursuant to and in compliance with all applicable governmental requirements, approvals and permits required for such work, which permits and approvals shall not be unreasonably denied or delayed.

If Champlain has reason to believe that the decision of the City Engineer is made in bad faith, Champlain has the right, as a property owner, to seek legal and/or equitable relief, including temporary and permanent injunctive relief.

3. **MAINTENANCE & PERFORMANCE OF WORK**

Except during construction, maintenance, replacement, repair or relocation, Champlain shall maintain the Conduit and the land needed to support it in a manner that does not impair the public rights of way, including the protection of utilities, pedestrians and vehicles traveling upon the public right-of-ways within and adjacent to the property occupied by the Conduit.

Champlain may enter onto the City's Maple St. right of way to bore under, excavate, support, fill and otherwise take such actions as may be necessary or appropriate as required from time to time to ensure the structural integrity of the Geothermal System pursuant to and in compliance with all applicable governmental requirements, approvals and permits required for such work.

Champlain shall maintain the Conduit and the land needed to support it in a manner that protects the right of way and all utilities, existing or future, located within the right of way or adjacent to the rights-of-ways. Champlain agrees that any and all expenses assumed by a utility to repair damages caused to the utility by the construction, use, maintenance, repair or relocation of the Conduit allowed by this Agreement shall be reimbursed by Champlain. Utilities currently located in the right of way are depicted in the Plan and are incorporated herein by reference. Prior to the commencement of any future work by Champlain on the right of way pursuant to this Agreement, a then current drawing(s) of utilities located in and adjacent to the relevant portions of the right of way shall be prepared by Champlain and submitted to the City.

Champlain agrees to protect vehicles and pedestrians traveling upon the Maple St. right-of-way from damage caused by its or its officers', representatives', agents', employees', or contractors' in connection with the construction, maintenance, repair, relocation, or use of the Conduit.

In the exercise of its rights under this Agreement, Champlain will perform all work in the right of way in a good and workmanlike manner, in conformance to the requirements of any and all permits and permit requirements required for such activity by the City. Champlain shall perform all work so as to cause no unnecessary damage or disturbance to the City's lands or the utilities located therein or the public's rights in the right of way. In each and every instance, Champlain shall restore each portion of the right of way disturbed by Champlain's entry to the same and as good a state and condition as they were immediately prior to Champlain's entry unless otherwise required by a permit or permit condition issued by the City concerning said work.

4. RIGHT OF PROTECTION

Upon reasonable notice to the City, Champlain shall have the right to enter upon the Maple St. right of way from time to time for the purposes of the protection of the Conduit, including but not limited to conducting inspections, surveys, preparing appraisals, conducting soils tests or engineering studies, and obtaining other information about the right of way.

Champlain's entry onto the right of way for the purposes set forth herein and its activities on the right of way as permitted herein shall occur at the sole risk of Champlain. Champlain shall indemnify, hold the City harmless and defend the City

from and against any and all claims, liens, damages, losses and causes of action which may be asserted by Champlain or Champlain's employees and agents or any third party as a result of any such entry, including reasonable attorney's fees. Champlain's entry onto or testing of the right of way shall be conducted in a manner that minimizes any disturbance to the land and to the use and enjoyment of the right of way by the City or the public. Subsequent to completing said inspections, surveys and tests, Champlain shall, at its sole expense, return the right of way as nearly as is practicable to the same and as good a state and condition as they were immediately prior to Champlain's entry unless otherwise required by a permit or permit condition issued by the City concerning said work.

5. **PERMITS**

Champlain is subject to any and all applicable permits, applicable permit fees, and permit conditions required for the above stated activity by the City, including but not limited to applicable permits for land use, excavation, obstructions, storm water and building construction. Prior to the commencement of work, Champlain must pay all permit fees and obtain all requisite governmental approvals and permits necessary to construct, maintain and use the Conduit and the improvements benefiting from the Conduit described herein. All work done and improvements made in connection with the Conduit granted herein shall be completed in accordance with the governmental approvals and permits issued to Champlain and shall be made at Champlain's sole cost and expense. Grantee shall restore the Maple St. right-of-ways, if disturbed, following any disturbance in accordance with all governmental regulations, permits and approvals, and such restoration shall be made at Champlain's sole cost and expense.

6. **PAYMENT FOR FAILURE TO PERFORM**

Except as otherwise provided in this section, if Champlain fails to perform its obligations hereunder as and when called for, then, after thirty (30) days written notice by the City, Champlain shall make payment to the City of reasonable compensation for the failure to perform. After such thirty (30) days written notice to Champlain and failure to timely cure by Champlain, City also shall have the right, in its sole discretion, to recover all amounts expended by the City in furtherance of purposes and terms of this Agreement, and to pursue any further legal or equitable remedies provided by law, including specific performance, damages, and attorneys fees. In the event of a dispute between the parties under this Agreement, the prevailing party shall be entitled to collect all costs of suit, including reasonable attorney's fees.

Champlain shall not have the right to an additional 30 days written notice for the failure to relocate or obtain required permits, as required in Section 2.

7. **INSURANCE**

Champlain shall maintain in effect throughout the term of this Agreement comprehensive public liability insurance with an A rated insurance carrier, or better, qualified to transact business in the State of Vermont, insuring against all legal liability for injuries or damages suffered as a result of the exercise of rights granted pursuant to this Agreement in an amount not less than \$1,000,000 each occurrence and \$3,000,000 general aggregate. The City shall be named as an additional insured on such insurance policy.

Prior to execution of this Agreement, Champlain shall furnish the City with a certificate of insurance which shall include the provision that the City is named as an additional insured and shall be given 30 days written notification prior to cancellation of such insurance. The certificate shall be attached to this Agreement.

It is the responsibility of Champlain to ensure that a current certificate of insurance are on file with the City at all times.

8. INDEMNIFICATION

Champlain agrees to indemnify, defend and hold the City harmless and free from any and all liability, demands, claims, causes of action, suits, actions, costs and expenses (including attorney's fees and disbursements), losses, injuries, death, or damages, judgments or executions, of whatever kind or nature, including reasonable attorneys fees, arising out of Champlain's use of the right of way pursuant to this Agreement. This includes any claims arising out of any indemnity and third party claims. Champlain agrees to make no claim against the City or any of its officers, employees, agents or representatives for any loss or damage caused by the City's use or maintenance of its right-of-way, unless caused by the gross negligence or an intentional act of a City employee, contractor or agent.

9. FEE

There shall be a one-time fee paid by Champlain for the rights provided by this Agreement in the amount of \$2,500. This fee shall be paid to the Burlington City Clerk-Treasurer's Office prior to construction. This fee shall be in addition to any other applicable City fees, including but not limited to land use, excavation, obstruction, storm water, building permit or other permit fees associated with permits that Champlain must obtain for the activities associated with this Agreement.

10. REVOCATION

This Agreement is immediately revoked in the event Champlain discontinues the use of the Conduit. Upon revocation, Champlain must remove at its own expense the Conduit and appurtenances thereto. If Champlain refuses to promptly remove the

Conduit and appurtenances thereto, they may be removed by the City and Champlain shall be liable for all reasonable expenses of such removal.

11. NUISANCES PROHIBITED

Champlain shall not, during the effectiveness of this Agreement, maintain the Conduit in a manner which creates a nuisance or violation of any applicable City of Burlington ordinance, State or Federal statute, or controlling bylaw, regulation, or condition imposed, whether existing at the time of commencement of this Agreement or enacted, amended, or otherwise put into effect during the term of this Agreement. Such prohibition of nuisances or violations of law shall include permitting the creation of a nuisance or violation of law.

12. ASSIGNMENT OF RIGHTS

Champlain shall not sell or assign its rights pursuant to this Agreement or permit the use of the premises or any part thereof by any other entity without the express prior written consent of the City. Any unauthorized action in violation of this provision shall be void, and shall, after sixty (60) days written notice to Champlain, terminate Champlain's rights pursuant to this Agreement.

13. LIMITATION OF RIGHTS

Champlain acknowledges that no property or other right is created other than that specifically defined and limited by this Agreement, and by entering into this Agreement, neither Champlain nor the City shall be deemed to have waived or relinquished any of its common law or statutory rights as a property owner. If Champlain alleges that it has or will be irreparably harmed by a bad faith action of the City under this Agreement, nothing contained herein shall prohibit Champlain from pursuing any legal or equitable remedies provided by law, including specific performance, damages and attorney's fees.

DATED at Burlington, Vermont this _____ day of _____,

2012.

CITY OF BURLINGTON

Witness

By: _____
Mayor, Duly Authorized Agent

CHAMPLAIN COLLEGE INCORPORATED

Witness

By: _____
Duly Authorized Agent

1165059_v5: 1491-00154